SUPREME COURT OF THE UNITED STATES.

UNION STOCK YARDS COMPANY OF OMAHA, (LIMITED,)
Plaintiff in Error,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Defendant in Error.

Brief and Argument on Behalf of Plaintiff in in Error.

STATEMENT OF THE CASE.

This case comes to this court in the form of a question certified by the United States circuit court of appeals for the eighth circuit. The certificate, omitting formal parts, is as follows:

"The United States circuit court of appeals for the eighth circuit sitting at St. Paul, Minnesota, on this 14th day of July, 1903, hereby certifies that the record in the action above entitled shows that this action is duly pending before this court on a writ of error sued out to reverse a judgment of the circuit court of the United States for the district of Nebraska which sustained a demurrer to the second amended petition of the plaintiff, Union Stock Yards Company of Omaha (Limited), and dismissed its action against the defendant, The Chicago, Burlington & Quincy Railroad Company, on the ground that the petition did not state facts sufficient to constitute a cause of action, and the record herein also shows that these were the facts alleged in that petition:

The plaintiff, The Stock Yards Company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto and motive power to operate cars for the purpose of switching them to their ultimate destination in its yards from a transfer track which connects its tracks with the railways of the defendant, The Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff and the latter hauls them to their points of destination in its yards for a fixed compensation which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall on the ground that it was caused by the

negligence of the Stock Yards Company in the discharge of its duty of inspection to its employee. This judgment was subsequently affirmed by the supreme court of Nebraska *(Union Stock Yards Company vs. Goodwin, 57 Neb., 138)*, and was paid by the plaintiff.

In the action before this court the Stock Yards Company seeks to recover of the Burlington Company, upon this state of facts, the amount it was compelled to pay by this judgment on the ground that the proximate cause of the injury to its employee, Goodwin, was the negligence of the Burlington Company in the discharge of its duty of inspection of the car before it delivered it to the Stock Yards Company.

And the circuit court of appeals for the eighth circuit certifies that the following question of law, among others, has arisen and is presented by the assignment of errors in this case, that its decision is indispensable to a correct determination of the case and that, to that end, it desires the instruction of the supreme court upon this question:

"Is a railroad company which delivers a car in bad order to a terminal company that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

ARGUMENT.

Counsel for the plaintiff in error base the claim that the defendant is liable to the plaintiff, under the facts stated in the question, on the correctness of the following propositions:

First Proposition: Both plaintiff and defendant were liable to the plaintiff's employe for the injuries he received.

Second Proposition: The defendant having been guilty of the original wrongful act from which the damages arose, and but for its breach of a duty it owed plaintiff the injury would not have resulted, the rule that there can be no redress (indemnity or contribution) between joint tort-feasors, is not applicable to the facts stated, but the exception to that rule, which is, that where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others, is applicable to the facts stated in the question.

AUTHORITIES IN SUPPORT OF THE FIRST PROPOSITION.

Pennsylvania Railroad Company vs. Snyder, 53 Ohio St., 342.

Snyder, an employe of the Lake Shore & Michigan Southern Railway Company, was injured by reason of a defective car which had been delivered to that company by the Pennsylvania Railroad Company under a traffic arrangement between the two railroad companies. He sued both companies, but dismissed as to the Lake Shore Company. One contention of the Pennsylvania Company was that *its negligence was not the proximate cause of the injury, that the causal connection was broken by the intervening negligence of the Lake Shore Company.* The supreme court of Ohio, in disposing of that contention admits and emphasizes the fact that the Lake Shore Company was liable for the injuries to Snyder, and concludes:

"But it does not follow that because the Lake Shore Company is liable for the damages sustained

by plaintiff below that plaintiff in error may not be also. To relieve the latter from the consequences of its negligence it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that without it the injury would not have occurred. To have that effect it must have been the efficient, independent, and self-producing cause, disconnected from the negligence of the plaintiff in error. The causal *connection is not broken 'if the intervening event is one which might, in the natural course of things, be anticipated as not entirely improbable,* and the defendant's negligence is an essential link in the chain of causation.' Shearman & R. Neg., 4th Ed., Par. 32. It is not essential to the liability of the plaintiff in error that its negligence should be the sole cause of the injury; but if that result was produced by the negligence of both companies, each contributing a necessary condition to the result, either or both might be held responsible, at the election of the party injured. Neither could claim exoneration on account of the fault of the other. *The negligence of the plaintiff in error was undoubtedly the primary cause. If it had not furnished the defective car, the injury could not have occurred.* Neither could it, if the Lake Shore Company had not run the car over its road. And it might not have done so, if that company had made a proper inspection of the car, but it was the act of that company in hauling the car over its road that contributed to bring about the injury, rather than its failure to have it properly inspected; for if the car had not been so moved, no injury could have happened, however negligent the inspection may have been. *The most that can be claimed from the omission of the proper inspection by the Lake Shore Company is that it failed to cure or remove the previous negligence of the plaintiff in error, and thereby interrupt the consequences which were likely to and did flow from it. That failure cannot, with propriety, be said to have broken the connection between the negligence of the plaintiff in error and the injury resulting from the use of the*

defective car, or to have been the self-operating cause of the injury. That the car would be hauled over the road of the Lake Shore Company was contemplated by both of the companies when it was delivered. It was delivered for that purpose, and the plaintiff in error knew it could not be so hauled without the services of the brakeman and other employees of the company hauling it, and ordinary prudence would suggest that if it furnished a defective car, or failed to observe due care in providing cars that were reasonably safe and fit for the service contemplated, those employees might, and probably would, suffer injuries in consequence. The jury might therefore properly find, as they did, under instructions to which no exceptions were taken, that, while the negligence of the Lake Shore Company was a contributing condition to the injuries sustained by the plaintiff below, the negligence of the plaintiff in error was the culpable and proximate cause.

"It is further claimed that the plaintiff in error was under no obligation or duty to the employees of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania Company because his injury was received while acting exclusively under the employment of the Lake Shore Company; the servant being bound, it is argued, by the act of the master. We think this position is not tenable. *It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public.* Whenever a person should reasonably apprehend that, as the natural and probable consequence of his act or neglect, another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises, and if the injury results

from the failure to use such care, a liability to the person injured will generally exist, in the absence of any other controlling fact. As is said in Bishop's Non-Contract Law, Par. 528, 'One's responsibility for his acts is not limited to their immediate effects. He is liable also for their natural and probable consequences * * * nor is it material whether those consequences come from the acts alone or from them and subsequent independent forces operating with them, provided those forces are of a sort reasonably to be anticipated.' The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise. It has already been observed that the traffic arrangement between these two railroad companies contemplated that cars furnished by the plaintiff in error to the other company would be handled by the employees of the company receiving them, and a prudent person would reasonably anticipate and forsee that such employees would be exposed to the danger of receiving injuries in handling a defective car so furnished; or one with defective appliances. And, therefore, the *plaintiff in error owed a duty to such employees operating a train in which such a car might be placed, which was to use reasonable care in making inspection of the cars and putting them in safe condition before they should be placed in charge of the employees.* The services of such employees being necessary to accomplish the transportation intended, *the delivery of a car to be transported over the road amounts to an invitation to the employees to go upon and handle it, and an assurance that they may safely do so in the course of their employment, in transporting it to its destination. The case of Moon vs. Railroad Company, 46 Minn., 106,* is quite like the one before us in its features thus far considered, and presents substantially the same questions. That is a well considered case, and the decision is in harmony with our view of the law."

Moon vs. Northern Pacific Railroad Company, 46 Minn., 106.

The plaintiff's intestate, Moon, was a brakeman in the employ of the St. Paul, Minneapolis & Manitoba Company, and was killed while attempting to set a brake upon a car of the Northern Pacific Company which had been transferred to the Manitoba Company, under a traffic arrangement between the two companies. The court, taking up the question whether the relations of the deceased, as an employe of the Manitoba Company, to the Northern Pacific Company, were such as to entitle the plaintiff to maintain the action for its alleged negligence, disposes of it as follows:

> "As respects the transportation of freight in bulk from stations on one line to those on the other, the two roads are operated together, and *it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common law duties as carriers, or by mutual agreement;* neither company is obliged to draw the cars of the other over its line if they are unsafe or out of repair. *Mackin vs. Railroad Company, 135 Mass., 201; Gottlieb vs. Railroad Company, 100 N. Y., 469, 3 N. E. Rep., 344. It is then the primary duty of the company seeking such transportation to use due diligence to provide cars reasonably safe for the service contemplated.* The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty. *But such duty is not limited to the corporations as such , but extends to, and is owed to the servants who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition.* One may owe two distinct duties in respect to the same thing,—one of a special character to one person, growing out of special relations to him; and another of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty. *1 Shear & R. Neg., Par. 116. Bigelow Cas. Torts, 614.* Subject to proper limitations, the

rule generally stated is, that if a reasonable man must see that if he did not use due care in the circumstances he might cause injury to the person or property of another entitled to repose confidence in his diligence a duty arises to use such care. Smith Neg. 12, and notes; *Heaven vs. Pender, 11 Q. B. Div., 506.* In this last case *Winterbottom vs. Wright, 10 Mees & W., 109,* and other cases relied on by the defendants, are explained and distinguished. See also *Pol. Torts, 449.* We do not inquire as to the application of the rule here considered to intermediate carriers.

"The delivery of the car to the servants of the Manitoba company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact.

"Undoubtedly, by virtue of the relation of master and servant, the Manitoba company would be liable to its employees if it undertook to use cars of another company without due inspection and they should turn out to be defective and unsafe by reason of defects which might be ascertained by reasonably careful inspection. *Gottlieb vs. Railroad Company, Supra; Fay vs. Railway Co., 30 Minn., 231, 15 N. W. Rep., 241. But as respects the condition of the car at the time it was delivered, the Manitoba company did not owe the duty of inspection and repair to the Northern Pacific Railroad Company.* It might refuse to receive and haul it if not in good condition, but *the primary duty to use due diligence, to see that the car was then safe and in suitable repair, rested upon the latter company,* though the Manitoba Company might also be subject to liabilities and duties, in respect to the car, growing out of its acceptance, possession and subsequent use. *And the company owning the car should be held responsible for the consequences of its own wrongful or negligent acts or omissions, notwithstanding concurring negligent acts or omissions of the company receiving the car. The negligence of the latter does not ex-*

cuse or relieve the former from liability for injuries resulting from its negligence. The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. 1 Shearman & R. Neg., 26. And if the original wrong only becomes injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause and the injury should be imputed to the last wrong and not to that which is more remote. In order to relieve the first wrongdoer there must intervene between him and the plaintiff an independent, responsible agent, breaking the causal connection. *Wharton Negligence, Par. 438.* We do not think that such a case is here presented. The duty to exercise due care in the premises devolved upon each company. Neither can excuse itself through the fault of the other. Besides, in this case, the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors."

The principle here laid down was followed by the Supreme Court of Minnesota in 1901 in the case of *Teal vs. Am. Min. Co. et al., 87 N. W., 837.* The following statement is the syllabus in that case:

"A railway carrier transferring a car of its own to a connecting carrier for use upon its line owes to the servants of the latter the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the proposed use. The negligence of the latter in receiving and using the car cannot relieve the former from liability for an injury to such servants, caused by a defective car negligently transferred by it. Rule applied and *held*, that the complaint herein states a cause of action as to each of the defendants."

Hoye vs. Great Northern R. Co. et al., 120 Fed., 712. In this case the employee of the receiving company injured by

reason of a defective car owned and transferred by the delivering company sued both companies. And there it was decided that, "When by agreement between railroad companies owning connecting lines, cars are transferred from one road to the other, both companies owe the duty to employees of the receiving company to exercise reasonable care to see that such cars are in proper repair; and, where such an employee is injured by reason of a defect which existed when a car was so transferred, he may join both companies as defendants in an action for the injury."

In the case of *Heaven vs. Pender, 11 Q. B., Div. 506*, the defendant, a dock owner, supplied and put up a staging on the outside of a ship in his dock, under a contract with the ship owner. The plaintiff was a workman in the employ of a ship painter, who had contracted with the owner to paint the outside of the ship, and in order to do the painting the plaintiff used the staging, when one of the ropes by which it was slung being unfit for use when supplied by the defendant broke, and by reason thereof the plaintiff fell into the dock and was injured. And it was there held, reversing the decision of the Queen's Bench Division, that plaintiff being engaged on work on the vessel, in the performance of which the defendant, as dock owner, was interested, the defendant was under obligation to him to take reasonable care that at the time he supplied the ropes and staging they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to plaintiff for the injury he had sustained. Held, also, by Brett, M. R., "that whenever one person is by circumstances placed in such a position with regard to another that everyone with ordinary sense, who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct, with regard to those circumstances, he would cause danger of injury to the person or property of

the other, a duty arises to use ordinary care and skill to avoid such danger." Sir Henry Cotton, in his opinion in the case, states that "after the stage was handed over to the ship owner it no longer remained under the control of the dock owner. But when ships were received into the dock for repair, and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting, or otherwise repairing them, were there for business in which the dock owner was interested, and they must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. That to these persons the dock owner was under an obligation to take reasonable care that at the time the appliances provided for ordinary use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of a ship to any danger or risk not incident or necessary to the service in which they were employed, and that this obligation exists as regards articles of which the control remains with the dock owner, and that the same duty must exist as to *things supplied by the dock owner for immediate use in the dock of which the control is not retained by the dock owner,* to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for ordinary use in relation to the repairs. And that for any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed when the article was supplied by the dock owner."

In the case of *Elliott vs. Hall, 15 Q. B. Div., 315,* the defendant, a colliery owner, consigned coal sold by him to the buyers by rail, in a truck (English word for freight car). Through the negligence of the defendant's servants the truck

was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coal and had got into the truck for that purpose, and it was there held that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck and the defendant was therefore liable to the plaintiff in respect to the injuries sustained by him. Sir William Grove in delivering the opinion in that case said that it appeared to him to be a much stronger case in favor of the plaintiff than the case of *Heaven vs. Pender,* and that the plaintiff was entitled to recover independently of the decision of the court of appeal in *Heaven vs. Pender,* and speaking of the contention that there was no contract between the plaintiff and the defendant, he said: "It is contended that there is no duty because there was no contract with the plaintiff, *but the plaintiff was acting as the servant of the company with whom the contract was made, and that the defendant must have known that the buyers would not unload the coal themselves, but that their servants would do so.* Under these circumstances, it seems to me clear that there was a duty not to be guilty of negligence in regard to the state and condition of the truck."

Sir Archibald Smith, in the course of his opinion in the same case says: "It was argued, however, that, though the defendant was guilty of negligence, the plaintiff cannot succeed because there was no duty owed by the defendant to the plaintiff to take care with regard to the condition of the truck. But it appears to me that there was such duty. Look first at the position of the plaintiff. He is not merely one of the general public, or a bare licensee, or stranger. He is not a person who had no business in the truck. It was his duty to unload the truck. Then, what is the position of the defendant?

The defendant had entered into a contract for the supply of coal to the plaintiff's employers *and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants.* Those being the resepctive positions of the plaintiff and defendant, I can not see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck which the plaintiff was to unload was in a safe state."

Counsel submit that upon reason as well as upon authority declared in *Moon vs. Northern Pacific R. Co., Penn. R. Co. vs. Snyder, Heaven vs. Pender, Elliott vs. Hall, Hoye vs. Great Northern R. Co. et al, 120 Fed., 712,* and *Teal vs. Am. Min. Co.,* plaintiff's first proposition is established.

The case of the *Missouri, Kansas & Texas Railroad Company vs. Merrill, 70 Pac. (Kan.), 358,* without doubt, will be cited by counsel to show that defendant could not have been made liable to the plaintiff's employee for the injuries received by reason of the defective car, and counsel for plaintiff desire here to submit some observations with reference to the opinion in that case. In that case it appears that a brakeman in the employ of the Chicago Great Western Railway Company was injured through defects in a car loaded at St. Louis by the Missouri, Kansas & Texas Railroad Company on its road for shipment to St. Joseph, which company carried it to Kansas City and there delivered it to the Suburban Belt Line Railway Company, and that company in turn delivered it to the Great Western Company, and while the car was in the possession of the latter company the brakeman was injured while handling the car in performance of his duty as an employe of the last named company. The brakeman sued the Missouri, Kansas & Texas Railway Company and the Suburban Belt Railway Company on account of the injuries thus received. The case was considered on two oc-

casions by the supreme court of Kansas. The first opinion is reported in the *60 Pac. Rep., 891, 61 Kansas, 671*, and the second opinion is found in the *70 Pac. Rep. at 358*. In the first opinion it was held "that it was within the knowledge and contemplation of the first two companies (Missouri, Kansas & Texas Railway Company and Suburban Belt Railway Company) that such cars were to be handled by switchmen of connecting lines, and that they owed a duty to the latter to the extent that the car transported should be in reasonable repair, so that in switching it no harm should result," and, "that the first two railway companies may be sued jointly, that the negligence of the company in possession of the car at the time of the accident, in failing to inspect it was concurrent merely, and did not break the causal connection between the negligence of the first two companies and the plaintiff's injury." The opinion cites several authorities to sustain the conclusion, among them, *Pennsylvania Railroad Company vs. Snyder, Supra,* and *Moon vs. Northern Pacific R. Co., Supra.* Also the following:

Railroad Co. vs. Booth, 98 Ga., 20.

Horne vs. Meakin, 115 Mass., 326.

Heaven vs. Pender, 11 Q. B. Div., 503 (506).

Thrussell vs. Hannyside, 20 Q. B. Div., 359.

Elliott vs. Hall, 15 Q. B. Div., 315.

Garnett vs. Bridge Co. (C. C.), 98 Fed., 192.

The circuit judge, in the case last cited, said in the course of his opinion:

> "A master owes no duty to a servant which, under like circumstances, he does not owe to any other person. 'Negligence is where a person neglects or omits to do a thing which he is obliged by law to do,' and the legal obligation of a master to

take ordinary care for the prevention of harm to his servant does not result from any doctrine which is peculiar to the contract for personal service, but from the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others. Wherever, by invitation, and not as a trespasser, one man comes upon the premises of another, or is, as matter of business, supplied by another with any article which is liable to inflict injury when being used, he, though not a servant, is entitled precisely as if he were, to assume that the place or the article is reasonably safe, and to be informed of any latent source of danger of which he is ignorant."

In the second opinion of the Kansas supreme court, which was delivered on a second and different appeal from the first one, it was held that "a railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured by reason of such defects, after the car has been inspected by the company receiving it. The loss of control of the car and over the servants having it in charge, relieves the delivering company from responsibility to the employees of the receiving company," and that part which we have quoted from the first opinion is overruled by the second. A reading of these two opinions will disclose that the Kansas court in the first opinion agreed with the reasoning and conclusion in the case of *Moon vs. Northern Pacific Railroad Company, Supra,* in which case it was laid down that for the purposes of determining the liability of the Northern Pacific Company to the injured brakeman in the employ of the Manitoba company, by reason of a defect in a car delivered by the former company to the latter, that *"it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common law duty as carriers, or by mutual agreement;* neither company is obliged to draw the cars of the other over its lines, if they are unsafe or out of repair. *It is then the*

primary duty of the company seeking such transportation to use due diligence to provide cars reasonably safe for the service contemplated. The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty. *But such duty is not limited to the corporation as such, but extends to and is owed to the servants, who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition.* One may owe two distinct duties in respect to the same thing—one of a special character to one person, growing out of special relations to him; and another of a general character to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty."

In the case of *Pennsylvania Railroad Company vs. Snyder, Supra,* which had been cited with approval by the Kansas supreme court in its first opinion, it was declared that it was not necessary to the liability of the delivering company that a contractual relation should exist between it and the injured brakeman in the employ of the receiving company, *nor that the injury should be one resulting from the violation of a duty which the delivering company owed to the general public,* and that whenever a person should reasonably apprehend that as the natural and probable consequence of his neglect another will be placed in a situation of danger of injury, a duty of using due care arises, and if the injury results from the failure to use such care a liability to the person injured will generally exist, in the absence of any other controlling fact, and that one's responsibility for his acts is not limited to their immediate effects, but he is liable for their natural and probable consequences, and that it is not material whether those consequences come from the acts alone or from them and subsequent, independent forces operating with them, provided

those forces are of a sort reasonably to be anticipated. *And, further, that the test is to be found in the probable injurious consequences to be anticipated and not in the number of subsequent events and agencies that may arise.* The Kansas supreme court in the second opinion undertakes to show that the *Moon* case and the *Snyder* case are distinguishable from the Merrill case, which it was deciding. It is pointed out by that court that both in the *Moon* case and in the *Snyder* case the transfer of cars or the business of transportation was carried on under agreements between the companies. But we have seen that it was declared in those cases that *it was immaterial whether the traffic was carried on under a statute, their common law duty as carriers, or pursuant to agreement.* The duty to use due care arises out of circumstances and not necessarily out of contractual relations. Contracts may be the cause of conditions, they may bring the circumstances about, or they may create the condition, but a failure to use due care under these circumstances or conditions cannot be excused when damages have ensued from a failure to use that care, upon the ground that no contractual relations exist between the injured party and the one failing to use such care. The one failing to use due care may become liable to an entire stranger and one entirely a stranger to the contractual relations out of which the conditions requiring due care arose. In the *Moon case,* which is cited with approval in the first opinion of the Kansas court, it is declared that:

> "It is then the primary duty of the company seeking such transportation (the delivering company) to use due diligence to provide cars reasonably safe for the service contemplated. The rule above referred to, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty."

The Kansas court also in the first opinion cited *Heaven*

vs. Pender, Elliott vs. Hall, and *Garnett vs. Bridge Company* with approval.

The Kansas court overrules the first opinion, basing its last conclusion on the assertion that (1) a duty rested upon the receiving company to inspect the car, and that company failing to discharge its duty in that respect broke the causal connection between the negligence of the delivering company and the receiving company; and (2) that the liability of the *master to his servant* ceases with the control of the *master* over *his actions!* The first opinion was by a unanaimous court, as was also the second opinion, but from the second opinion one of the judges dissents in part, and states in his dissent, that he cannot consent to the proposition with reference to the breaking of the causal connection, and that he did not think the judgment could be allowed to rest on that proposition. It will be observed that in the second opinion in the *Merrill* case importance is placed on the failure of the receiving company to inspect the car when delivered. Now the duty imposed on the receiving company to inspect does not arise out of contract. It arises out of the law itself. It is a duty imposed by the law upon the receiving company. But it is not a duty imposed for the *benefit of the delivering company. It is not a duty designed to protect the delivering company against the omissions or negligent acts of the receiving company.* Plainly, it is simply an application of the general rule of law that in all the affairs of life persons must use due care so as not to injure others, and clearly *this duty to inspect is imposed by the law for the benefit of the employees of the receiving company.* The delivering company owes a duty to the receiving company, as well as the employees of the receiving company, as we have seen from the authorities cited, to take care that cars delivered are in a reasonably safe condition for handling. This duty imposed on the receiving company to

inspect foreign cars simply requires it to use the same degree of care in regard to foreign cars as it is required to use in regard to its own cars, that is, it must use reasonable care to see that all cars going into use by it are in proper condition for such use. *This rule or duty is imposed solely for the benefit of the employees of the receiving company, and grew out of the law with reference to the relation of master and servant, and was never intended for the benefit of the delivering company*, and its non-observance by the receiving company cannot be invoked in the case at bar by the delivering company to shield it from the result of its own negligence in delivering to plaintiff a car to be handled for the delivering company's benefit, on business it was directly interested in. We submit that the Kansas court lost sight of the real question in the second opinion, and overlooked controlling rules.

For in all such cases these are controlling questions: Did the delivering company have an interest in the thing to be done by means of the chattel delivered? Had the delivering company an interest in or a right to have the chattel delivered at a certain place under contract with the receiving company? Was it in reasonable contemplation at the time of delivery that the chattel would be used for the purpose it was used, or was it in fact delivered for this use? An examination of the authorities cited by the supreme court of Kansas in this second opinion will disclose the fact that these material and controlling facts do not appear in the cases cited. See the case of *Sawyer vs. Railroad Company, 35 Northwestern, 671. (38 Minn., 103)*, cited by the Kansas court in its second opinion, where the car causing the injury to the employee had been delivered to the receiving company loaded with freight by the delivering company for a point beyond its lines, and had been carried by the receiving company to its destination and the load disposed of, and the car when the injury occurred

was being used by the receiving company in its own business, in which the delivering company was not interested. See also the case of *Glynn vs. Railroad Co., 175 Mass., 510,* in which the opinion was delivered by the then Chief Justice of the Massachusetts court and now a member of this court, where the facts do not show that the delivering company had any interest in the business being transacted with the car, or for what purpose the car was delivered, and the Chief Justice considered the case as coming under the rule laid down in *Sawyer vs. Railroad Company* and indeed he pointed out in the opinion that the rule had been held to be different where the use from which the damage ensued was plainly contemplated and the authorities sustaining this view.

Now in the case at bar not only did the defendant have an interest in the thing to be done with the car, *but it had hired the plaintiff to do that very thing.* Not only did the defendant deliver the chattel to be carried, *but furnished with it the means and appliances by which the chattel was to be carried.* Not only was it in contemplation by defendant that the chattel would be used by plaintiff's employees, *but defendant delivered it to them for that purpose and invited such use.*

Counsel desire to emphasize the fact that the defendant in the case at bar owed a duty to the receiving company and its employees entirely aside from and independent and without reference to the rule of law requiring the plaintiff as between it and its employee to use due care with respect to cars delivered to it, and that the duty so owing by defendant is imposed by law, and is illustrated in the rule that in the transaction of business one must use due care to see that he does not by his neglect injure those with whom such business is carried on, and that the defendant owed this duty to the plaintiff before the duty of the plaintiff to its employee arose in reference to the car delivered. It is just as culpable for a

railroad company to deliver a car with a defect that could be discovered by reasonable inspection to a terminal company, to be carried by the terminal company, for a consideration paid it by the railroad company, to its ultimate destination on the premises of the terminal company, the point at which the railroad company was interested in having it delivered, as it would be for a master to deliver a defective appliance to a servant to be used in the master's service where the defect could be discovered by the use of reasonable care on the part of the master. In each case it is simply an application of the rule requiring due care so as to avoid injury or damage to others. There is no more reason for requiring the receiving company to make inspection of the car delivered for the use contemplated under contract with the delivering company, than there would be to require the servant to inspect the tools and appliances delivered to him by his master. If the defect in either case was only discoverable by reasonable inspection, and the danger from the use of it was not so apparent as to cause a reasonably prudent man to hesitate to use it, neither the terminal company nor the servant could be said to be guilty of negligence if they failed to make such inspection. There is no pretense in this case that the defect was so apparent and the danger from its use so plain that a reasonably careful man would hesitate to use the car under the circumstances. We submit the second opinion in the *Merrill* case cannot be reconciled with the authorities or right principles.

In passing this branch of the argument counsel desire to state that it is not contended that the decision of the question at bar can be referred to the principle laid down by Mr. Wharton in his work on Negligence (2d Ed.) 134, for the reason that the principle there laid down is applicable only where the original wrong-doer has been negligent on a particular subject matter as to which he is not con-

tractually bound. In the case at bar the defendant had employed the plaintiff to carry the car to the point mentioned by means attached to the car itself, for the reasonably safe condition of which defendant was answerable, and therefore the defendant sustained contractual relations as to the particular subject matter. But counsel in making this comment suggest that if the decision can be referred to the principle there stated by Mr. Wharton it is plain that the plaintiff would be entitled to recover.

AUTHORITIES IN SUPPORT OF THE SECOND PROPOSITION.

Gray vs. Boston Gas Light Co., 114 Mass., 149.
(19 American Reports, 324.)

In this case it appears the Gas Light Company attached a wire to a house owned by plaintiff bordering on a street, whereby the chimney was pulled down and damage done to passers-by which the plaintiff was compelled to pay. And it was held the plaintiff might recover of the Gas Light Company the damages thus resulting which he was compelled to pay. The court declared the plaintiff, as the owner of the house, was bound to keep it in a proper and safe condition as between himself and the public, and that the Gas Light Company, which placed the wire on the chimney and rendered it dangerous, was liable to plaintiff in any damage he sustained by reason of placing such wire thereon. The court also stated that when two parties acting together commit a wrongful act, the party who is held responsible in damages for the wrongful act cannot have contribution from the other, because both are *equally culpable*, but this rule of law does not apply *when one does the act or creates the nuisance and the other does not join therein but is thereby exposed to liability and damage.* He may recover from the party whose wrongful act exposed

him. In such cases the parties are not in *pari delicto* as to each other, though as to the third parties either may be liable. That court further said that the owner could not protect himself from liability on the ground that he did not know the building was unsafe; he was bound to exercise proper care under the circumstances. Now the plaintiff in the case at bar could not protect itself in the suit brought against it by its injured employee on the ground that it did not know the car delivered to it by the defendant was in a defective condition. The plaintiff was bound *as between itself and its employee* to use proper care to see that the car was in a safe condition. In *Gray vs. Boston Gas Light Company* the defendant caused the plaintiff to become liable by reason of it attaching a wire to a chimney of a house owned by the plaintiff, thereby putting plaintiff's house in an unsafe condition. The plaintiff could have learned of this unsafe condition by the use of ordinary care, but he failed to exercise such care, and having so failed he was liable to third parties for any injury resulting from its unsafe condition. In the case at bar, the defendant delivered the car in bad order to the plaintiff under a contract that the plaintiff was to perform a service for the defendant with respect to moving the car to its final destination. In the *Boston Gas Light Case* the defendant by its negligent act caused the plaintiff's house to be in a dangerous condition, whereby the plaintiff was rendered liable for damages that resulted by reason of such dangerous condition. In the case at bar the defendant negligently delivered to the plaintiff the car in a defective condition, and as a result of the use thereof by one of the plaintiff's employees he was injured and the plaintiff made liable in damages therefor.

Lowell vs. The B. & L. R. Co., 23 Pickering, 24.
(34 American Decisions, 33).

In this case the defendant railroad company was making

a cut or a grade across a street in the city of Lowell, and had neglected to put up barriers at that place. Injuries were received by a traveler on the street because of the failure of the company and the city to put up barriers. The city was compelled to respond in damages for its neglect and failure to properly protect the street at the place where the injuries were received, and the city having paid these damages sued the railroad company to recover the amount it had been compelled to pay. It was in that case held that the plaintiff could recover. The railroad company was liable to the city because it and the city were not in *pari delicto*. The court in the course of the opinion says:

> "The defendant's agent who had the superintendence of their works, was the first and principal wrong-doer. It was his duty to see to it that the barriers were put up when the works were left at night; his omission to do it was gross negligence; and for this the defendant was clearly responsible to the parties injured. In this negligence of the defendant's agent, the plaintiff had no participation. *Their subsequent negligence was rather constructive than actual.* The most that can be said of it is, that one of their selectmen confided in the promise of the defendant's agent to keep up the barriers and by this misplaced confidence the plaintiffs have been held responsible for damages to the injured parties. *If the defendant had been prosecuted instead of the town, it must have been held liable for damages, and from this liability they have been relieved by the plaintiffs.* It cannot, therefore, be controverted that the plaintiff's claim is founded in manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability; and the policy of the law does not in the present instance interfere with the claim of justice.
>
> "The circumstances of the case distinguish it from those cases where both parties are in *pari delicto*, and one of them, having paid the whole damages, sues the other for *contribution*."

Now in the *Gas Light Company case* we have seen that where two parties acting together commit a wrongful act, the party against whom damages is recovered cannot have contribution from the other for the reason that both are equally culpable, but this rule precluding contribution has no application to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability and damage. That he may recover in such case because the parties are not in *pari delicto*, though as to third parties either may be liable. The court in the *Boston Gas Light case* declared that the rule precluding contribution should not be applied to the facts in that case as the facts made it a case for *indemnity* and not contribution. In that case though the owner of the building allowed the dangerous situation to exist as it had been created by the defendant, yet the court held that the owner had not joined in the act creating the dangerous situation . So in the *Lowell case*. The city of Lowell, although it allowed the street to remain in the dangerous condition in which it had been put by the railroad company, was held not to have joined therein by suffering such dangerous condition to remain. In the case at bar, the plaintiff in a similar manner allowed the dangerous condition of the car to exist, yet it had not joined in the act of creating such condition, any more than the house owner had joined in the act of creating the dangerous condition of the house to travelers upon the street or the city of Lowell had joined in creating the dangerous condition of the street. In each of the cases cited and the case at bar the plaintiff had so acted or failed to act as that damages accrued to a third party which the plaintiff in each case was compelled to pay, but the plaintiff in neither case joined in the original act creating the dangerous condition and therefore was not in *pari delicto* as to the one who had done the primary act and

created the dangerous condition from which the injury resulted. The plaintiff in the *Gas Light Company case*, and the plaintiff in the *Lowell case*, were each allowed to recover *indemnity*, not contribution. So the plaintiff in the case at bar should be allowed to recover. The plaintiff here can no more be said to be in *pari delicto* as to the railroad company defendant, than the house owner in the *Gas Light Company case* can be said to have been in *pari delicto* as to the defendant Gas Company in that case, or the city of Lowell to the railroad company defendant in that case. In the *Lowell Case* the court says in the opinion that the city had no participation in the acts which caused the injury. The court in the *Lowell Case* further say: "Their (the city's) subsequent negligence was rather constructive than actual." Also: "If the defendant had been prosecuted instead of the town, it would have been liable for damages, and from this liability they have been relieved by the plaintiff." Counsel for plaintiff submit, that if it can be said that the town of Lowell in that case had no participation in the acts from which the dangerous situation arose and damages resulted, *it can as well be said that the plaintiff in the case at bar had no participation in the act of negligence from which the dangerous condition of the car arose and from which damages resulted.* And that if it can be rightly said in the *Lowell Case*, as was said by that court, "It cannot, therefore, be controverted that the plaintiff's claim is founded in manifest equity. The defendant is bound in justice to indemnify it so far as it has beenrelieved from a legal liability; and the policy of the law does not, in the present instance, interfere with the claim of justice,"the same thing can be rightly said in the case at bar. There can be no reason for applying the rule in the *Lowell case* and refusing it here. We are equally forced to the conclusion that if the judgment of the Massachusetts court was right in the *Boston Gas Light*

case, that a right judgment here is to allow the plaintiff at bar to recover.

We call attention also to the fact that the court in the *Lowell case* declared that the circumstances of that case distinguished it from cases where both parties were in *pari delicto*, and one who had paid the whole damage was seeking *contribution* of the other. As in the *Gas Light case*, so in the *Lowell case*, the court refused to apply that rule to the facts—for the facts made a case for *indemnity*, and not for contribution. We are unable to discover any distinction between the two cases last cited and the case at bar. The cases are similar and should rest upon the same principles. In the *Boston Gas Light case* the plaintiff owed a duty to use reasonable care to keep his building in a safe condition for travelers upon the street. In the *Lowell case* the city owed a duty to use reasonable care to keep its streets in safe condition for travelers on them. In the case at bar the plaintiff owed its employee the duty to use due care to keep cars coming into its possession from the defendant, and which cars were to be handled by its employe, in a safe condition for handling. In the *Boston Gas Light Company Case* the defendant owed a duty to the plaintiff to use proper precaution in fastening or placing its lights so as not to render the plaintiff's house dangerous to travelers on the adjacent streets, and also owed the same duty to such travelers. In the *Lowell case* the railroad company owed a duty to the City of Lowell, not to render its streets dangerous in making the excavation across it, and also owed that duty to the travelers on the street. In the case at bar the defendant owed a duty to the plaintiff to use due care to see the cars delivered to it were in a reasonably safe condition for handling, and it owed the same duty to the employees of the plaintiff. *Moon vs. Northern Pacific, Railroad Company, Heaven vs. Pender, Elliott vs. Hall, Garnet vs. Bridge*

Company, Hoye vs. Great Northern Railroad Company, Pennsylvania Company vs. Snyder, Supra. The plaintiff in the *Gaslight Company case* was compelled to pay damages caused directly by the act of the defendant. The plaintiff was permitted to recover in that case. The plaintiff in the *Lowell case* was compelled to pay damages caused directly by the act of the defendant in that case. And there the plaintiff was permitted to recover. The plaintiff in the case at bar has been compelled to pay damages caused directly by the act of the defendant. The plaintiff should be permitted to recover. It will be noticed that in the two cases, the *Boston Gaslight case* and the *Lowell case*, the indemnity sought to be recovered was for damages that had been adjudged in one case and compromised in the other in suits brought against the plaintiffs based in each instance on the plaintiff's negligence. The plaintiff in the *Boston Gaslight case* could not state his complaint without alleging that his liability to the injured party arose out of his failure and neglect of his duty. Nor in the *Lowell case* could the plaintiff there state its complaint without showing that as between the plaintiff and the injured party a judgment had been rendered for damages based on the town's negligence. So in the case at bar it is necessary in plaintiff's petition for the plaintiff to disclose the fact that a judgment has been rendered against it in favor of the injured party based on the plaintiff's negligence. But in neither the *Lowell case* nor the *Boston Gaslight case* did such allegation of fact preclude recovery, for the reasons stated in the opinions in those cases, and we claim the same reasons apply here and should not preclude recovery by the plaintiff in the case at bar. In each of the cases as well as in the case at bar the defendant was guilty of the original act from which the injuries resulted. In each of the cases as well as in the case at bar the plaintiff's negligence was constructive rather than actual, and no wrong

was intended. In each of the cases as well as in the case at bar the plaintiff cannot be presumed to have intended a wrongful act. Upon this subject, Cooley in his work on Torts (1st Ed.), on page 144 says:

> "On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong-doing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it. But there are some exceptions to the general rule, which rest upon reasons at least as forcible as those which support the rule itself. There are cases, although the law holds all the parties liable as wrong-doers to the injured party, *yet as between themselves some of them may not be wrong-doers at all*, and their equity to require others to respond for all the damages may be complete. There are many such cases, where the wrongs are *unintentional*, or where the party *by reason of some relation*, is made chargeable with the conduct of others."

To the same effect see Bishop on Non-Contract Law, paragraph 535.

In a foot note to *Centerville vs. Cook, 16 American State Reports, 254*, the editor, admitting and recognizing the general rule as often stated, that one of several joint tort-feasors can not enforce *contribution* from the others, proceeds to consider under what circumstances and to what extent one of the several persons answerable for the negligent act and who has been compelled to respond in damages for said act, can have redress (indemnity or contribution) against the others, and says:

> "Even in the case of active torts, this rule is applicable only against the one who was himself in fault. But if the act for which recovery has been

had was not ordinarily nor necessarily unlawful, and the person seeking contribution or indemnity did not in fact intend any wrong, and the act and circumstances are not such that he must be presumed to have intended a wrong, then he may recover."

To sustain this statement he cites the following cases:

Akerman vs. Miller, 2 Ohio St., 203.

Adamson vs. Jarvis, 4 Bin., 66.

Betts vs. Gibbons, 2 Ad. & E., 57.

Farwell vs. Becker, 129 Ill., 261 (16 Am. St. Reports, 267).

Continuing, the editor says:

"The instances are very numerous in which persons are made to respond in damages for negligence for which they are not personally in fault, as when the negligent act or omission was that of a servant or agent, or consisted in the non-performance by another person of his duty, which, had it been performed, would have prevented the happening of the injury in question. In such cases if the party who was not culpable is nevertheless compelled to pay damages, he has a cause of action to enforce *indemnity* from the one who was really culpable."

To sustain this last statement, he cites, among other cases, *Minneapolis Mill Co. vs. Wheeler, 31 Minn., 121 (16 N. W. Rep., 698).* This case fairly sustains the statement of the editor, and the opinion cites several authorities.

A consideration of the authorities cited we think shows our second proposition established, and while counsel for plaintiff believe the liability of defendant for the injury and damage stated can, with safety and upon sound principles, be rested upon the correctness of the two propositions discussed, yet there are other considerations upon which the defendant may be held to account directly to the plaintiff for this damage.

The defendant is liable for all damages that are the natural consequence of its negligent act. Now the chattel the defendant delivered to the plaintiff was such that it was equipped with the means or machinery by which it was to be moved. It was also equipped with an appliance for checking the speed when in motion and for stopping it. If, when the defendant set the car on the transfer track and while it was still in its possession, this defective brake had been used in an attempt to stop the car at the proper place on the transfer track, and by reason of the defect in the brake it failed to perform its function and the car had by reason of the failure to stop it run into and injured a building belonging to the plaintiff, it seems plain that the defendant would be liable to the plaintiff for the resulting damages. If after the car had been placed upon the transfer track by the defendant and the plaintiff through its employees had set it in motion, and by reason of the defective brake they were unable to stop the car and it had run into a building belonging to the plaintiff and injured it, it seems plain that the defendant would be liable for the damages in that case for the plaintiff owed defendant no duty to inspect the car. Now if the defendant is liable in case the car escapes from its own control by reason of the defective brake, and injures the building, and is also liable where it escapes from control of the plaintiff's employees by reason of the defective brake and injures a building, why is it not liable where by reason of the defective brake the plaintiff is damaged through injury to its employee? Why should it be recompensed for damages done to its building, and not be recompensed for damages sustained through injury to its employee?

We think it is plain that the defendant ought to be held liable for all the damages that result from the use of the defective brake by the defendant or by those it hires or invites to use the car to which the brake is attached.

CONTRIBUTION.

Counsel here submit some further citations which will serve to illustrate under what circumstances *contribution* will be allowed among wrong-doers, and while the case at bar is a case for *indemnity* and not contribution, these authorities will serve to show the distinction between cases for contribution and those for indemnity. There is a class of cases where it is clear that there can be no redress, as where two persons assault another, or one induces another to commit an assault on a third; where two creditors of a common debtor direct the levy of process on the property of a third person to satisfy their debts; and in all cases where two or more commit a wrongful act to the injury of another by agreement among themselves. In this class of cases the parties are active, the wrongs positive and intended. There is no need of citation of authorities to sustain the statement that there can be no redress in such cases in favor of one who has been compelled to respond in damages. These are cases of intentional wrongs. But negligence has no element of intent. It necessarily excludes a condition of mind capable of designing an injury. A negligent person exercises no will at all. *Wharton's Neg. (2d Ed), paragraph 132.* But where the tort is one by construction or inference, the case is not covered by the rule.

Armstrong vs. Clarion County, 66 Penn. St., 218, 5 Am. Reports, 368.

In this case it is held that where a person is injured in passing over a defective bridge which two counties are jointly bound to keep in repair, and recovers judgment of one county, the other county is liable to contribution. And the rule that wrong-doers can not have contribution or redress against each other is held to be confined to cases where the one seeking redress must be presumed to have known he was doing an un-

lawful act. The court in that case quotes from *Story on Partnership, Section 220,* as follows:

> "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not."

To same effect see Bishop, Non-Contract Law, Pars. 56 and 535.

The case of *Vandiver vs. Pollak (Alabama), 19 L. R. A., 628,* is a late and instructive case, and several authorities are cited and reviewed. Among the rest are *Adamson vs. Jarvis, Betts vs. Gibbons, Armstrong vs. Clarion County,* cases heretofore cited in this brief.

The rule that wrong-doers cannot have contribution or redress against each other is confined to cases where the plaintiff is presumed to have known he was doing a wrongful act.

Block vs. Estes, 10 Western Rep., 668, (92 Mo., 318).

Scofield vs. Gaskill, 60 Ga., 277.

Owen vs. McGehee, 61 Ala., 440.

Armstrong Co. vs. Clarion Co., 66 Pa. St., 218, (5 Am. Rep., 368).

Jacobs vs. Pollard, 10 Cushing, 287, (57 Am. Dec., 105).

Cooley on Torts, 148.

Pollock on Torts, 171.

Horback vs. Elder, 18 Pa. St., 33.

Farwell vs. Becker, 129 Ill., 261, (16 Am. St. Rep., 267).

In the case last cited the authorities are reviewed. The rule is deduced as a result of all the cases, that the rule of law that there can be no contribution among wrong-doers applies only where there is an intentional, meditated or wanton wrong done, but where the tort is a *constructive* one the rule does not apply. Nor does the rule apply to a person made a wrong-doer by inference of law. See

Merryweather vs. Nixon, 2nd Smith's Leading Cases, 456-460.

Pearson vs. Skelton, 1 M. & W., 504.

Adamson vs. Jarvis, 4 Bin., 66.

In a note in the *16 American State Reports, 257,* we find the following stated:

> "While the decisions on the subject are as yet infrequent and meagre, we think we may safely say that they maintain that where two or more persons are jointly and equally answerable for negligence, and one of them has been compelled to discharge the whole liability, he is entitled to contribution from the others, provided the circumstances are not such that he must be presumed to have intended to do an unlawful act or an intentional wrong. Where the negligent acts have been separate and distinct, and committed by persons not partners, nor jointly acting nor interested in a common purpose, it may be that the rule is inapplicable; but we have met with no case either affirming or denying the applicability. But where the neglect is joint, *as where it consists of the omission of a duty which each of the parties was equally bound both in law and in good conscience to discharge, then each is entitled to contribution from the other.* Thus if the owners of a party wall have permitted it to become in a dilapidated and dangerous condition, or if two counties equally bound to keep a bridge in repair have neglected their duty in this regard, and either of them has been compelled to pay damages resulting from such negligence, contribution from the other party may be enforced."

Citing:

Armstrong Co. vs. Clarion Co., 66 Pa. St., 218. (5 Am. Rep., 368).

Ankeny vs. Moffett, 37 Minn., 109, (33 N. W., 320).

In Nebraska the rule has been declared to be that "in determining whether one joint wrong-doer is entitled to *contribution* from another, the test is, whether the former knew at the time of the commission of the act for which he has been compelled to respond that such act was wrongful."

Johnson vs. Torpy, 35 Nebraska, 604.

Rule affirmed on rehearing of same case in 43 Nebr., 882.

Ankeny, assignee, etc., vs. Moffett, 37 Minn., 109.

In this case it is held that the rule that there can be no contribution among wrong-doers applies only where the person seeking the contribution must be presumed to have known that he was doing an illegal act, and that a person is not deprived of the right of contribution from another, also originally liable, where the ground of this liability is simply negligence on the part of each in carrying on some lawful business. Moffett and one Johnson being severally the owners of adjoining lots joined in erecting a building upon the lots and united in letting the contract for construction. The building fell and injured one Walters who sued them and recovered judgment, which Moffett paid and sought contribution of Johnson's assignee. The opinion cites several authorities, among them Cooley on Torts, 144, 147, *Adamson vs. Jarvis, Horbach vs. Elder, Armstrong Co. vs. Clarion Co.*, all of which have been referred to.

SUMMARY.

These are the material features in this case which show the justice of plaintiff's claim for indemnity:

The car was delivered by the defendant to the plaintiff under a contract that plaintiff was to perform a service with the car for the defendant.

The defendant, therefore, had an interest in the use the car was to be put to and in the thing to be done with it.

It was in contemplation of the defendant at the time of delivering the car, in fact it was intended by the defendant, that the plaintiff would use the car and its appliances and equipment in performing the service for defendant.

The defendant owed a duty to the plaintiff to see to it that the car at the time of delivery was in proper condition to be used for the purposes for which it was delivered.

The defendant neglected this duty, and was thus guilty of a wrong, and from this negligent act of defendant the damages arose as a natural result.

But for this negligent act, this failure to perform a duty on the part of the defendant which it owed to the plaintiff, the injury and damage would not have occurred.

The act of defendant was, therefore, the primary cause of the damage sustained by plaintiff.

The defendant owed the same duty to plaintiff in this transaction not to damage the plaintiff's servants, that it owed to plaintiff not to so act as to damage the plaintiff's property.

If the defective car had been the cause of injury to plaintiff's buildings, plaintiff must be put to the expense of repairing them, and if the car, by reason of its defective condition, was the cause of injury to plaintiff's servant, it must likewise repair that damage. So that it was immaterial whether the

damage was directly to the plaintiff's property or to the plaintiff's servant whom the plaintiff was bound under the law to protect against such damages.

The plaintiff owed no duty to the defendant to inspect the car. As between them the plaintiff had a right to presume the defendant would use due care under the circumstances, as the service to be performed was the purpose for which the delivery was made.

The defendant was guilty of positive, active wrong to the plaintiff. The negligence of the plaintiff as between it and its employee who was injured was rather constructive than actual and on the part of the plaintiff no wrong was intended.

The plaintiff did not create the bad condition of the car from which the injury resulted, nor did it participate in the creation of that condition.

As between the plaintiff and the defendant the plaintiff was not a wrong-doer at all.

The defendant was liable directly to the injured employee for the injuries received. Its act caused these injuries, and the plaintiff has been compelled to repair the damage thus caused directly by defendant's act.

The plaintiff's claim for indemnity is manifestly equitable and just, and there is no principle of law, nor rule, in the administration of justice, which should prevent it from recovering.

CONCLUSION.

From what is said in all of the leading cases upon the subject of indemnity and contribution among wrong-doers, and comments by text writers and editors on the subject, the fol-

lowing is believed to be a correct statement of the rules governing such cases:

(*Indemnity*).

Where one through his negligent act has exposed another to liability and the one so exposed acts in the position he has been placed in such manner as to incur to a third party the liability to which he has been exposed, the one so exposed may recover from the one so exposing him any damages he is put to, though such liability was as between him and the injured party the result of his own negligence. For the reason that the one so exposing the other was guilty of the first wrong and thereby failed in his duty to the person he thus exposed and was the primary cause of the damage which resulted; for the further reason that the subsequent negligence of the one exposed was constructive rather than actual; for the further reason that under such circumstances both parties are liable to the party injured, and the injury would not have happened but for the one first failing in his duty, and being thus the cause of the injury there is nothing but common justice in requiring him to repay the one who has been compelled through his wrongful act to respond in damages.

(*Contribution*).

Where injury has resulted to a third person through the *joint* negligence of two or more persons, and one of these has been compelled to pay the damage for such injury, the one so responding in damages may recover a proportionate amount thereof of the others, providing no moral wrong was intended, as where two or more are engaged in the same lawful enterprise through the neglect of all a third party is injured and notably so in the case of partners. The rule that there can

be no redress between joint wrong-doers applies only to cases where the act done or omitted was an intentional, wanton or moral wrong.

It is respectfully submitted that the case at bar is one for indemnity and that the question certified should be answered in the affirmative.

FRANK T. RANSOM,
Attorney for Plaintiff in Error.